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IN THE

Supreme Court of the United States

SUPER DUPER, INCORPORATED,
D/B/A SUPER DUPER PUBLICATIONS,
Petitioner,

v.

MATTEL, INCORPORATED,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE STUTTERING FOUNDATION, GREAT IDEAS FOR TEACHING, INC., AND SPEAK UP FOR SAY IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici curiae The Stuttering Foundation, Great Ideas for Teaching, Inc., and Speak Up For Say all share a commitment to the education of children with speech and learning disabilities. They understand firsthand the critical need for both innovation in educational tools for these children and clear communication about the therapeutic and educational functions of these tools. *Amici* submit this brief to explain to the Court the profoundly harmful impact on those interests of the sweeping trademark damages rules adopted by the court of the appeals in this case.[1]

The Stuttering Foundation is the largest nonprofit charitable organization dedicated to preventing stuttering and improving its treatment throughout the world. Among its many activities, The Stuttering Foundation provides publications, online resources, and support to individuals who stutter and to their families, as well as support for research into the causes of stuttering.

Great Ideas for Teaching, Inc. develops materials for speech language pathologists to use in the education of children with speech and learning disabilities. Formed in 1985, Great Ideas for

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[1] Counsel of record for the parties received notice of *Amici's* intention to file this brief more than 10 days before the brief was due. The parties have consented to the filing of this brief. No party or counsel for a party authored this brief in whole or in part, and no party or counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Teaching is a leader in the field of special education publishing. Like petitioner, Great Ideas for Teaching uses commonplace words, such as "see" and "say," in its publications and other educational resources. Great Ideas for Teaching also sells innovative speech therapy materials produced by other companies in the forefront of special education, including petitioner.

Speak Up For Say is an organization that voices the concerns of the special education community and hundreds of affected and interested individuals over the use of trademark law in this case to penalize the use of the word "say" in materials and resources used to teach children with speech and learning disabilities.

INTRODUCTION AND SUMMARY OF ARGUMENT

The uniformity of trademark law nationwide is vital for business and consumers alike. As documented in the petition, however, trademark law is anything but uniform on the question of the legal standard for the recovery of damages: the circuits are deeply split on whether a plaintiff can recover damages under trademark law in the absence of evidence of intentional infringement of the plaintiff's mark or evidence of actual confusion between the plaintiff's mark and the defendant's product. The court of appeals' decision in this case further entrenches that divide.

Beyond exacerbating the circuit split, the court of appeals' decision is emblematic of skewed judicial interpretations of our intellectual property laws. As this Court repeatedly has stated, those laws are

intended to strike a careful balance between intellectual property rights, on the one hand, and innovative development and consumer benefits on the other hand. The court of appeals' decision confounds that balance. Nobody confused respondent's mass-marketed "See and Say" line of toys with petitioner's use of the words "see" and "say" in its specialized educational products for children with speech and language disabilities. And there was no evidence that petitioner intended to infringe respondent's mark. Yet, the court of appeals construed the Lanham Act to allow respondent, the world's largest toy manufacturer, to collect a seven figure damages award from petitioner. That rigid interpretation of the law was unnecessary to protect intellectual property rights and will have adverse consequences on businesses, therapists, teachers, and consumers in the specialized market of educational tools for learning and developmentally disabled children.

The repercussions of the court of appeals' decision are significant precisely because this case arises in the context of the education of disabled children, which Congress has recognized as a national priority. It is essential to that mission that parents and teachers of children with speech disorders be able to repeat the commonplace and therapeutically vital words "see" and "say" in their day-to-day lessons, and that businesses that make and distribute products and publications for their use be able to accurately convey the remedial assistance they provide. Exposing publishers and producers of specialized educational materials that seek to help children overcome speech disorders to multimillion dollar damages awards for simply using words like

"see" and "say" will hinder innovation and growth in the development of vital learning tools on which parents and teachers rely.

ARGUMENT

I. REVIEW IS WARRANTED BECAUSE THE COURT OF APPEALS' DECISION ENTRENCHES THE NUMBER OF CIRCUITS ADOPTING ERRONEOUS TRADEMARK LAW RULES THAT HINDER INNOVATION AND CONSUMER CHOICE.

A. *Amici* agree with petitioner that the court of appeals' decision expands a circuit conflict on the recurring question of the standards by which courts may award a plaintiff the defendant's profits under the Lanham Act, 15 U.S.C. § 1117(a). More specifically, this case presents the question whether damages awards may be imposed for the use of commonplace words like "see" and "say" when there is no evidence that the defendant intentionally infringed the plaintiff's trademark or that customers were actually confused by the alleged infringement. Pet. at 1-3, 11-27.

Resolution of that important question of federal law should not turn upon state boundaries. Virginia and North Carolina, which both have large and very active high technology corridors, are within the Fourth Circuit, and businesses there fall subject to the developmental chilling effect that the Fourth Circuit's heavy trademark damages hammer imposes on industry. *Amicus curiae* Great Ideas for Teaching is headquartered in North Carolina and thus, like petitioner, is subject to the Fourth Circuit's

trademark damages rule for using commonplace and therapeutically critical words like "see" and "say" in labeling its special educational products that help developmentally disabled children learn to speak and say words. Furthermore, because Great Ideas for Teaching and the Stuttering Foundation distribute publications throughout the country, they could face potentially crippling trademark damages liability in the other five circuits that do not require evidence of intentional infringement or actual confusion as a predicate for the imposition of damages.

B. The sharp division in the circuit courts of appeals merits this Court's review not only because of the critical need for uniformity in the administration of trademark law, but also because the questions presented in the petition encapsulate cross-cutting concerns about overreaching in the enforcement of intellectual property laws in general. Here, that overreaching has broad implications on businesses and consumers in the area of developmental and learning disability education.

As this Court repeatedly has recognized, intellectual property laws like the Lanham Act strike a "careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989). Accordingly, the manner in which those laws are interpreted necessarily affects the emergence and development of the nation's businesses and the nature of the products that they market. The court of appeals' decision here, like the rulings from the other five

circuits that do not require intentional infringement or actual confusion as a predicate for trademark damages awards (Pet. 11-13), disregards this Court's teaching in *Bonito Boats*.

The decision also contravenes *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205 (2000), in which this Court stressed that the trademark law, in the context of a trade dress dispute, should not be interpreted in a manner that would deprive "consumers * * * of the benefits of competition with regard to the utilitarian and esthetic purposes that product design ordinarily serves," *id.* at 213. The six courts of appeals' authorization of sweeping trademark damages awards without any finding of intentional infringement or consumer confusion fundamentally skews this Court's and Congress's balance by enforcing "a rule of law that facilitates plausible threats of suit against new entrants based upon alleged inherent distinctiveness" alone, even when the trademark pertains to a "not inherently distinctive" yet critically communicative word like "see" and "say." *Ibid.* These courts of appeals thus have overprotected the trademark holder in a manner that is "more harmful to other consumer interests." *Ibid.* *See also TrafFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 29 (2001) (stressing need for lower courts to exercise "caution against misuse or overextension of trade dress").

The courts of appeals that allow trademark damages even in the absence of intentional infringement or actual confusion also put trademark law at odds with patent law, where this Court has carefully maintained the balance between protecting inventors and the interests of consumers, reversing

lower court decisions that unduly expanded the scope of patent protection at the expense of innovation and consumer benefits. *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 420-21 (2007) (rejecting narrow test for proving obviousness of inventions); *MedImmune v. Genentech, Inc.*, 549 U.S. 118, 137 (2007) (rejecting requirement that patent licensees materially breach their licenses before they can challenge patent's validity); *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391, 393-394 (2006) (rejecting "general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances"); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830 (2002) (rejecting attempt to circumvent well-pleaded complaint rule by claiming exclusive jurisdiction over *any* case that includes patent law question).

At bottom, the circuits that eschew proof of consumer confusion or intentional infringement as a prerequisite to trademark damages awards adopt the very type of "[r]igid preventative rules that deny factfinders recourse to common sense" that this Court has consistently condemned as inimical to intellectual property law's careful balance. *KSR*, 550 U.S. at 421. A rule that places businesses on the hook for financially devastating seven-figure damage awards simply for employing commonplace words like "see" and "say" in designing resources for a specialized consumer market, without any risk of consumer confusion or intentional infringement, is "neither necessary under [this Court's] case law nor consistent with it." *Ibid.* Rather than "protect the ability of consumers to distinguish among competing producers," which is the purpose of the Lanham Act, *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S.

189, 198 (1985), the Fourth Circuit's decision threatens to destroy competition altogether or to deny consumers in specialized markets the basic information needed to understand the products and services being provided.

II. THE COURT OF APPEALS' RULING WILL HAVE ADVERSE CONSEQUENCES FOR CHILDREN WITH SPEECH AND LEARNING DISABILITIES AND THOSE WHO TREAT THEM.

A. Certiorari review is further warranted because this case arises in an area of vital national concern: the enhancement of educational opportunities for disabled individuals.

Through its initial passage of the Individuals with Disabilities Education Act ("IDEA") in 1975 and its subsequent reauthorizations and expansions of that law, Congress has made the education of children with developmental disabilities, including the types of speech and language disabilities that petitioner's products redress, a high national priority. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 523 (2007); *see also Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2491 (2009) (describing history of IDEA). Prior to the IDEA, "the majority of disabled children in America were 'either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to drop out.'" *Schaffer v. Weast*, 546 U.S. 49, 52 (2007) (quoting H.R. Rep. No. 332, 94th Cong., Sess. 2 (1975)) (additional quotations omitted); *see also* 150 Cong. Rec. S11543 (daily ed. Nov. 19, 2004) (statement of Sen. Kennedy) ("When Congress first

passed IDEA, disabled children were shuttered away. They had no place in our society."). Because of IDEA, children with developmental and learning disabilities are no longer "shuttered away." 150 Cong. Rec. S11543, *supra*. Instead, the Nation has come to recognize the enormous potential of such children to learn if afforded a fair opportunity and to make vital contributions to our society, in much the same way that the Americans with Disabilities Act has served to remedy the historic isolation and segregation of individuals with disabilities by "integrat[ing] them into the economic and social mainstream of American life." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (internal quotations omitted). *See Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring) ("[T]he law can be a teacher. So I do not doubt that the Americans with Disabilities Act of 1990 will be a milestone on the path to a more decent, tolerant, progressive society.").

B. Materials like those manufactured or published by petitioner, Great Ideas for Teaching, and the Stuttering Foundation are employed regularly by professional speech pathologists in their work with students who have speech and language disabilities. As a result, those educational materials play an important role in the fulfillment of the IDEA's goals of enhancing educational opportunity for students with disabilities.

Indeed, the number of children and adults with disabilities whose lives and contributions to society are enhanced by products developed by petitioner, Great Ideas For Teaching, the Stuttering Foundation and other specialized businesses like petitioner's is

staggering. In 2007-2008, more than 1.4 million individuals ranging in age from 3 to 21 received services under Part B of the IDEA for speech and language impairments. That represents more than 20% of the 6.6 million individuals receiving IDEA Part B services. NCES, Digest of Education Statistics, Table 50, *available at* http://nces.ed.gov/programs/digest/d09/tables/dt09_050.asp (last visited Dec. 2, 2010); *see also* Cal. Dep't of Education, 2009 Factbook on Education, p. 83, *available at* http://www.cde.ca.gov/re/pn/fb/documents/factbook2009.pdf (last visited Dec. 2, 2010) (noting that 176,256 people received special education services for speech or language impairment in California alone in 2007-2008). Those figures include hundreds of thousands of children with autism, 40% of whom do not talk and nearly all of whose ability to say words and to communicate is impaired. S. Rep. No. 318, 109th Cong., Sess. 2 (2006). The figures also include hundreds of thousands of students who stutter. As many as 5% of young children between the ages of 2 and 5 stutter, and some 1% of the population overall, or 3 million Americans, stutter. Stuttering Foundation, http:www.stuttesfa.org/Defaul.aspx?tabid=17.

C. The use of common words such as "see" and "say" in the materials published by petitioner, Great Ideas for Teaching, and the Stuttering Foundation are indispensable in the education of students with speech-language and learning disabilities, and in the marketing of remedial tools and resources. The repetition – the repeated saying – of words is necessary to help disabled students overcome or manage their speech and language disorders. Pet. 4. Basic words serve as building

blocks. Without them, it is difficult for students to progress to a higher level of instructional vocabulary and comprehension. Indeed, the word "say" is a basic component of language acquisition. It is one of the first verbal commands spoken to babies and is applied by every professional working on language acquisition and development and speech correction.

In this case, respondent, the world's largest mass-marketing toy company, claimed that the use of the words "see" and "say" violates marks that it has registered for certain of its toys. Respondent stands to reap $2 million on its claim, even though there was no evidence of intentional infringement and no evidence of actual confusion.

If the use of commonplace words like "see" and "say" can lead to multimillion dollar penalties on the factual record of this case, then specialized publishers like petitioner, Great Ideas for Teaching, and the Stuttering Foundation that serve children with developmental and learning disabilities will be reluctant to use key, simple terms in devising and explaining to teachers, therapists, and consumers the educational focus of their materials. Such entities may be forced to withdraw from the market altogether, for fear of being struck with large damages claims for even unintentional infringements where no consumer confusion resulted.

That retraction in the market will necessarily hinder innovation in special education. The impact will not be felt by the publishers alone, of course. Simply put, if allowed to stand, the lower courts' monetary judgment will compromise the work of professional speech pathologists who depend on

products like petitioner's and amici's and who need accurate descriptions of the design and therapeutic benefits of such products. Allowing the court of appeals' decision to stand thus will have an adverse impact on millions of students with speech disabilities, their parents, their therapists, and their teachers.[2] Rolling back educational progress on this important front hurts everyone, and merits this Court's consideration.

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[2] Studies show that parents of children with developmental disabilities are generally closely involved in the education of their children. *See* Lynn Newman, Research Digest, Involvement in the Education of Secondary-School Age Students with Disabilities, Fine Network, Harvard Family Research Project (2005); National Longitudinal Transition Study-2, Family Involvement in the Educational Development of Youth with Disabilities 86 (2005), *available at* http:/wwwnlts2.org/reports/2005_03/nlts2_report_2005_3_complete.pdf.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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